actually struck him on the forehead I consider it not unlikely that the deceased in some way deliberately obstructed him. This would well have happened without Langke observing it and would provide the last of a series of undoubtedly grave provocations. There is no doubt that the accused was at the moment deprived of the power of self-control. I agree with the assessors and I find that this act of provocation was having regard to all the circumstances sufficiently grave and sudden to prevent the offence from amounting to murder.

I find the accused not guilty of murder but guilty of culpable homicide not amounting to murder.

Sentence:

Deliberate killing with extreme violence provocation has reduced the offence to culpable homicide but the accused must learn that he cannot come to this country and commit such acts of violence — maximum — life imprisonment. I sentence accused to 10 years imprisonment.

MAHMOOD ALI v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim J.) December 22, 1963]

[Kota Bharu — Criminal Appeal No. 36 of 1963]

Criminal Procedure—Plea of guilty—Counsel informing Court before end of prosecution case that appellant wishes to plead guilty—Record of President stating "Accused confirmed the plea. Plea accepted"—Whether record sufficient—Criminal Procedure Code (Cap. 6), s. 173(b).

Oaths and Affirmation Ordinance, 1949, ss. 4(1)(a), 8 —Swearing by the Koran—Observations on.

The appellant was charged under section 420 of the Penal Code on 3 counts. He claimed trial and the learned President of the Sessions Court recorded the evidence as adduced by the prosecution. Before the case for the prosecution was closed, appellant's counsel informed the Court that the appellant wished to plead guilty. The learned President then recorded as follows: "Accused confirmed the plea. Plea accepted." On appeal,

Held: the record of the learned President that the "accused confirmed the plea" was not enough. There should be a record to show that the accused was asked to plead on all 3 counts and his plea in respect of each count. There should also be a record to the effect that the learned President has ascertained that the appellant understood the nature and consequences of his plea in respect of each charge and he intended to admit without qualification each offence alleged against him.

Observations on swearing by the Koran.

Case referred to:—

(1) *R.* v. *Heyes* 34 Cr. App.R. 161.

CRIMINAL APPEAL.

T. Selvarasan for the appellant.

Tengku Ahmad Rithauddeen (Deputy Public Prosecutor) for the respondent.

Hashim J.: The appellant was charged under section 420 of the Penal Code on 3 counts. He claimed trial and the learned President of the Sessions Court at Kota Bharu recorded the evidence as adduced by the prosecution. Before the case for the prosecution was closed, appellant's counsel informed the Court that appellant wished to plead guilty. The learned President then recorded as follows:— "Accused confirmed the plea. Plea accepted."

Lord Goddard C.J. in his judgment in *R.* v. *Heyes* [1] said *inter alia* "Counsel then indicated that his client desired to withdraw his plea and plead guilty to receiving. The shorthand note rather unfortunately does not contain any indication that the appellant was asked to plead, but merely a statement that his counsel said that he wished to plead guilty. Of course, that is not enough; the prisoner must himself plead." In my opinion, the record of the learned President that the "accused confirmed the plea" is not enough. There should be a record to show that the accused was asked to plead on all three counts and his plea in respect of each count. There should also be record to show that the learned President had ascertained that the appellant understood the nature and consequences of his plea in respect of each charge and he intended to admit, without qualification, each offence alleged against him — see section 173(b) Criminal Procedure Code (Cap. 6).

In the course of the proceedings the defence counsel stated that if a prosecution witness would dare to swear by the Koran his client, the appellant would plead guilty and would be prepared to go to prison. A Koran was handed to this witness and he swore by the Koran. Two more prosecution witnesses also swore by the Koran. With great respect I think learned defence counsel went beyond legitimate practice by requesting that prosecution witnesses be sworn by the Koran and the learned President went beyond his powers in allowing such a procedure to be adopted in his Court. Section 4(1)(a) of the Oaths and Affirmations Ordinance 1949 makes it obligatory for a witness in proceedings in Court to take the oath and the form of oath or affirmation is prescribed under section 7 of the Ordinance. It is the invariable practice of the Court to affirm a witness in any proceedings in Court as follows:—

> "I, A.B., do solemnly sincerely and truly declare and affirm that the evidence which I shall give in this case shall be the truth, the whole truth, and nothing but the truth".

I do not think any other form of oath or affirmation is necessary or required in any proceedings in a Court constituted under the Courts Ordinance 1948. Presumably the learned President had the provisions of section 8 of the Oaths and Affirmations Ordinance 1949 in mind when he allowed the prosecution witnesses to swear by the Koran. In my opinion it is desirable that such a procedure should be confined to civil cases only as provided under section 9 of the Ordinance

and such a ceremony should be performed outside the Court-House. In the case of Muslims, the swearing by the Koran should take place in a Mosque after the parties have "purified" themselves.

This appeal is allowed on the ground that the plea of appellant was not properly taken and there is a doubt as to whether the appellant pleaded guilty to one or all the three charges. The conviction and sentence is set aside and I direct that the case be retried before another President.

Appeal allowed. Re-trial ordered.

KHO KONG SENG v. MABBUN

[L.C.J. (Harley J.) January 9, 1964]

[Kuching — Civil Case No. C/121 of 1962]

Tort—Plaintiff suing owner of vehicle for damages —Vehicle driven by son of owner—Whether son driving with permission and authority—Whether son servant or agent of owner—Whether plaintiff entitled to damages.

Master and Servant—Son driving car belonging to father—Whether father liable for son's negligence— Whether son servant or agent of father—Whether son had permission or authority of father.

The plaintiff sued the defendant for damages suffered by the plaintiff in a motor accident. The defendant was the owner of the car which was at the material time driven by the defendant's son. The defence pleaded was that the driver was not a servant or agent of the defendant and that the journey during which the accident occured was entirely on the son's account.

Held: even assuming that the son of the defendant was driving the car with the defendant's authority and permission it was not possible in the circumstances of this case to draw the inference that the son was driving the defendant's car as the defendant's servant or agent, as the son was making the journey entirely on his own account. *Hewitt* v. *Bonvin* (2) applied.

Cases referred to:—

(1) *Fowler* v. *Hawksley* (1951) 2 Kemp & Kemp 2nd Edn. 95.

(2) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188.

(3) *Barnard* v. *Sully* 47 T.L.R. 557.

ACTION.

T. O. Thomas for the plaintiff.

Defendant absent.

Harley J.: In this case I shall consider damages first, the cause of the accident second, and liability third and last.

Under the special or itemised heads/pecuniary damage I approve:

Hospital charges	$300.00
Special food (This was not medically or physically necessary)	NIL
Transport (taxis) (This covers a reasonable number of visits. There was no necessity to take taxis every time)	$200.00
Damage to Bicycle (There was no satisfactory proof of the value of the bicycle or of the extent of damage)	NIL
Cash lost in Accident (Plaintiff himself did not mention this item. His mother's evidence did not substantiate it)	NIL
Surgical boots	$ 29.00
To this add for repair and replacement as time goes on	$200.00
TOTAL	$729.00

The last item of the above paragraph is strictly part of the general damage. In the pecuniary as well as the bodily sense one has to consider how the plaintiff's future will be affected by the accident. It is most difficult to estimate how far the accident affects plaintiff's earning ability. Certainly it has set him back in his studies. Mentally there should be no permanent effect. Physically, the boy before the accident already had one leg shorter than the other. (The effect of a pre-existing disability was discussed in *Fowler* v. *A. W. Hawksley* (1)). How much worse plaintiff's leg is because of the accident, and how far it will affect the plaintiff now and in the future, are matters covered by P.1 Mr. Cumming-Smith. Plaintiff's expectation of life is not shortened. His pain and suffering must have been severe, and will continue. He has lost in great measure the enjoyment of many of the amenities of life and will throughout his life suffer at the very least physical inconvenience and discomfort. Having read and re-read the medical evidence, and reflected that the effects on plaintiff's physique and on his career interact, I do not consider it necessary to itemise the heads of general damage. I would say that the sum of $20,000 (twenty thousand) represents and covers the total general damage suffered by plaintiff. Plaintiff, therefore, if he could recover in full, would be entitled to $20,000 plus $729.00, total $20,729.

Now I come to the question of division of liability, from the causation angle between the driver of the car and the plaintiff riding his bicycle. I accept that the car came very fast and was at first obscured from view, or partially obscured by a rise in the road. I still feel that the boy himself must have been one-third to blame, in crossing the path of the oncoming car, for failing to see it or to take avoiding action. I cannot pretend that I have ever had a clear-cut picture of this accident. The evidence of plaintiff himself and of the eye-witness P.4 fails to convince me that the car was more than two-thirds to blame. Plaintiff therefore, if entitled at all to recover, could only claim two-thirds of the damage suffered.

Lastly we came to the question whether defendant, the owner of the car, is answerable for the act of the driver who, I can take it, was his son. When Mr. Thomas first closed his case there was no evidence at all to connect defendant with the driver of the car. The defence pleaded